No. 3964

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADELAIDE MCCOLGAN, as administratrix with the will annexed of the estate of Daniel A. McColgan, and R. MCCOLGAN,

Appellants,

vs.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as administrator of the estate of Norvena Lineker, deceased, the plaintiffs in a suit pending in the Southern Division of the United States District Court for the Northern District of California, Second Division (Number 506 in Equity on the Records of said Court) and R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON, (formerly Mary J. Tynan), EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO and STANISLAUS LAND AND ABSTRACT COMPANY,

Appellees.

BRIEF FOR APPELLEES, FREDERICK V. LINEKER, AND FREDERICK V. LINEKER, AS ADMINISTRATOR OF THE ESTATE OF NORVENA LINEKER, DECEASED.

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Outline of Brief

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The Fact Situation.

The trial of this suit in the court below commenced January 22nd, 1922. A defensive plea of *res judicata* was interposed by the now complaining appellants and other defendants below. The state trial court record and briefs, in support of said motion were introduced, and arguments had on said motion before the trial court January 24th, 1922. At the close of the argument, when the colloquy between court and counsel ensued, and the comments of the court now objected to were made, counsel for appellants, Adelaide McColgan and R. McColgan, was personally present in court. At that time no objections were then and there interposed by any of the counsel for any of the defendants, and no exceptions then and there taken to any alleged improper remarks of the trial judge. The decision of the trial court on said plea of *res judicata* was under submission for over six weeks. (Record, 184, 188.) Immediately after the denial of the plea of *res judicata,* the present affidavits charging personal bias and prejudice were filed. On the hearing of said motion to disqualify and after due consideration, the said motion was denied. (Record, 189.) From said ruling this present appeal is now before this court.

THERE IS NO SUCH PERSONAL BIAS AND PREJUDICE SHOWN BY THE AFFIDAVITS FILED WHICH MEET THE SITUATION REQUIRED UNDER SECTION 21 OF THE UNITED STATES JUDICIAL CODE.

None of the defendants other than the McColgans are appellants on this appeal, nor have any of the counsel for the other nine defendants in the court below filed any briefs nor taken any part in this appeal. The integrity of the trial court is attacked only by the two litigants now appealing from the order denying their motion to disqualify the trial judge. If their said plea of *res judicata* had been sustained, the case could not have proceeded to trial on the merits.

Prior to the commencement of trial January 22nd, 1922, none of the defendants below filed any affidavits charging personal bias or prejudice on the part of the court. In the *Berger* case, 255 U. S. 32, relied on by the appellants, it appears that an attack had been made upon Judge Landis, charging personal bias and prejudice and that the affidavits making said charges were filed prior to the commencement of the trial.

The remarks made by the trial judge and now complained of merely touch on the testimony of Daniel A. McColgan, now deceased, in the *Dillon* case previously tried before the same court. (Record, 178.) The remarks objected to, we believe, are mere expressions concerning another case which had nothing to do with the merits of the present case whatsoever. The judge says he did not know the McColgan brothers. (Record, 178.) The passing

comments of the court made during argument of counsel, we believe, indicate to any reasonable mind that there was absolutely no such personal bias or prejudice in the mind of the trial judge which would preclude him from giving a perfectly fair and impartial trial to all of the defendants. In the case of *Ex Parte N. K. Fairbank Co.*, 194 Fed. 978, at 990, quoting from Justice Brewer in the case of *Emporia v. Volmer*, 12 Kans. 627, which discusses the elements requisite for an attack on the ground of personal bias and prejudice, it is said:

> "That such facts and circumstances must be proved by affidavits, or other extrinsic testimony, as clearly show that there exists a prejudice on the part of the judge towards the defendant, and unless this prejudice clearly appears, a reviewing court will sustain an overruling of the application on the ground that the judge must have been personally conscious of the falsity or non-existence of the grounds alleged. It is not sufficient that a prima facie case only be shown, such a case as would require the sustaining of a challenge to a juror. It must be strong enough to overthrow the presumption in favor of the trial judge's integrity and the clearness of his perceptions."

Measuring the charges made in defendant's affidavits by the foregoing citation, we feel we have a right to consider the following excerpts from said defendant's affidavits, to-wit:

From the Adelaide McColgan affidavit:

> "The COURT. I am satisfied from the impression made upon my mind by this argument, to which I have listened with a great deal of in-

> terest, that I would not be justified in proceeding at this time to the trial of the case on the merits. I want to examine this question for myself in the light of the authorities and in the light of the pleadings in the former cases, in the State Court; but I am very strongly impressed with the fact that the contention is well taken." (Record, 142, 143.)

After discussing the *Dillon* case and that the court desired to get away from the technical objection—technical in the sense that it does not involve the merits, the court continues:

> * * * "but I frankly say to you now that I cannot see my way clear upon the presentation that has been made here, and it has been a very thorough one, of avoiding the objection that has been made here." (Record, 145.)

Then after further discussion by the court concerning the rights of Mrs. Lineker and what had happened to her in the past, but without discussing any of the questions involving the merits of the present suit, the court continues:

> "I will continue the case on the merits until I have been able to examine those questions for myself, with the hope, as I say, that I may be able to avoid this defense, but with the fear that I shall not be able to." (Record, 146.)

That after further discussion between the court and counsel concerning the filing of authorities, the court concludes:

> "The case on the merits is continued indefinitely until I have had opportunity to go into this matter. Is there anything else? This

> stands submitted on the feature of the defense, the question of *res adjudicata.*" (Record, 147.)

The foregoing excerpts clearly show that the court is impartially passing upon matters submitted to it on the pleas raised by the defendants themselves. That they are submitting to the jurisdiction of the court, without any objection or exception then and there being taken by counsel representing any one or more of the defendants.

> "Common sense and the authorities alike teach that such expressions of opinion by a judge in the discharge of duty, concerning either the conduct of a litigant or its attorney, are not evidence of personal prejudice or bias as to either, and such comments and expressions have never yet been held, either in law or morals, to unfit a judge to try a case in which such observations have been made."
>
> *Ex Parte Fairbank,* supra, page 992.

The proceedings disclosed by the affidavits (Record, 143-145) merely show the comments of the court as to certain features of the *Dillon* case long since tried, and show that the court stated it did not feel justified to go on with the merits until the question of *res adjudicata* had been definitely settled. In said *Fairbank* case, supra, at page 997, we find the following:

> "It is not proof or evidence of the unfitness of a judge in a particular case that an honest but suspicious suitor, or a vicious and dishonest one, swears that he cannot obtain justice before him. Such an affidavit proves only the animus or belief of the man who makes it. It does not prove partisanship or personal preju-

> dice or bias in the judge. If the judge is not biased or prejudiced in fact, a false allegation or imputation that he is, made in the affidavit of a litigant, cannot change the actual mental or moral status of a judge or unfit him to try a particular case. Affidavits cannot change a pure and impartial judge into a bad official. It is the existence of bias or prejudice, and not the charge, whether honestly or dishonestly made, which constitutes the disqualification. A man by an ex parte affidavit may conclude his own rights or destroy his own reputation, but he can never conclude the rights of others or impose a discreditable status upon a public official by his mere statement of that which does not exist, however solemnly alleged in an ex parte affidavit. To hold otherwise would be to strike down a great principle of justice, which cannot be abandoned without destroying the very foundations of our jurisprudence."

And at page 1000 in said case we find:

> "The inherent powers of courts and judges set up to administer the judicial power of the United States have always been held to include ample authority to protect them against insult and assault, whether by physical violence or contumelious behavior and words, and it has been held time and again that the possession of such powers is essential to their independence and well being."

In the *Berger* case, Judge Landis had criticized the conduct of certain German citizens during the Great War and the objection to the judge presiding at the trial as a result of his remarks was made prior to the trial. In this appeal the charges go to mere comment made by the court concerning a prior suit, during the discussion of a controverted ques-

tion of law after the trial was commenced. It further appears from the very statements disclosed by the affidavits of Adelaide and R. McColgan that the court expressly says he feels that he will have to sustain the plea of *res judicata*. This being so, it is clearly evident from the facts that the appellants, feeling confident of their position, raised no objections, took no exceptions to the remarks of the court, submitted themselves to the jurisdiction of the court, but after an adverse decision then came into court and for the first time filed their attack on the trial judge.

In *Ex parte American Steel Barrel Co.*, 230 U. S. 35, at 43, Mr. Justice Lurton, in discussing this question of personal bias and prejudice says:

> "The bias of the disqualification (referring to Sec. 21) is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term."

And in *Henry v. Speer,* 201 Fed. 869, at 871, the court says:

> "Section 21 has to do with the personality of the judge before whom the suit is to be tried and rights established. It is remedial in its nature, that is, it is meant to afford relief from adventitious predicaments which fair minded men recognize should be relieved against, when they in fact exist."

Referring to the affidavit in this case (p. 872) the court says:

> "Its perusal reveals the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner, but rather a prejudgment of the merits of the controversy and 'against deponent's right to recover.' Section 21 is not intended to afford relief against this situation."

A judge's expressions of opinion, uttered in what he conceives to be the discharge of his judicial duty, are not evidence of bias or prejudice.

Epstein v. U. S., 196 Fed. 354, at 355;
State v. Bohan, 19 Kan. 28;
State v. Crilly, 69 Kan. 802;
Ex parte N. K. Fairbank Co., 194 Fed. 978.

We believe that timely objection should have been taken and exceptions interposed if the defendants below and appellants here are to be permitted to successfully raise the question now presented to the court under all the facts and circumstances in this

present suit, for, as stated in *Denver v. Home Savings Bank,* 200 Fed. 28:

> "The office of an exception, in practice, is to challenge the correctness of the rulings or decisions of the trial court promptly when made, to the end that errors in such rulings may be corrected by the court itself, if, upon its attention being called thereto, it deems them to be erroneous; and to lay the foundation for their review, if necessary, by the proper tribunal. In the courts of the United States such an exception, taken immediately upon the ruling being made, is indispensable to a review by the proper Appellate Court on the ruling."

See also

Railway Company v. Heck, 102 U. S. 120;
Potter v. United States, 122 Fed. 49.

APPELLEES COULD NOT KNOW WHAT THE APPELLANTS WERE DOING DURING THE FORTY OR MORE DAYS FOLLOWING THE SUBMISSION OF THE PLEA OF RES JUDICATA WHEN NO INTIMATION HAD BEEN GIVEN EITHER TO THE COURT OR TO THE APPELLEES THAT SAID APPELLANTS WERE OBJECTING TO THE REMARKS OF THE COURT BELOW, BUT ON THE CONTRARY THEIR MOTION HAD BEEN SUBMITTED WITH EVERY INDICATION BY THE TRIAL COURT THAT THE PLEA OF RES JUDICATA WOULD HAVE TO BE SUSTAINED.

We believe this statement sufficiently answers the arguments advanced in the brief for appellants that no counter affidavit has been filed to that portion of the appellants' affidavits setting forth their reasons why their objections were not filed prior to the time

they were presented in the said affidavits charging personal bias and prejudice. Not having information appellees could not in the very nature of things answer that portion of said appellants' affidavits.

ATTITUDE OF APPELLANTS.

The attitude of appellants, we believe, as disclosed from the record and their briefs on this appeal, reveals more of an assumption that there was personal prejudice and bias on the part of the trial court, rather than any real facts supporting the contentions advanced by them. We here quote a few excerpts from their brief:

> (Page 19.) "It is apparent that Judge Van Fleet believes that the McColgans defrauded Mrs. Lineker."
>
> (Page 32.) "In this case, Judge Van Fleet had heard what is tantamount to an *ex parte* account of the transactions which are the basis of this suit, and has been influenced thereby adversely to these defendants."
>
> (Page 41.) "Moreover, the statements made in this case show an extremely strong feeling on the part of the judge that these defendants have been guilty of gross fraud in the very matters which are the basis of the bill of complaint."
>
> (Page 59.) "Nothing that Judge Van Fleet could have said in 1919, before this suit was begun, could have given these defendants ground for the belief that he had prejudged this suit and had made up his mind, in advance of hearing their side of the case, to render judgment against them."

And again, same page:

> "When the administratrix learned for the first time on January 24, 1922, that the judge was biased and prejudiced, she had the undoubted right to the remedy provided by Section 21 of the Judicial Code."

These statements do not coincide with the attitude of appellants in sitting by mute, submitting their plea of *res judicata* for decision, remaining supine for six weeks or more thereafter, and then after an adverse ruling, immediately filing their affidavits charging personal bias and prejudice on the part of the trial court to which jurisdiction they had submitted themselves for a decision on their pleas of *res judicata.*

On page 60 of said brief, we also find certain *ex parte* statements by counsel as to matters *de hors* the record, which have no place in this appeal.

Conclusion.

We conclude with the following portion of the oral opinion of the trial judge, commencing with page 186 of the record:

> "Upon this hearing it appeared that the subject matter upon which the Court's alleged bias and prejudice is now predicated first arose in the case of Norvena Lineker v. Mary J. Dillon, et al., involving another phase of the same controversy tried before the court in 1919 and in which Daniel A. McColgan testified as to his relations to the property of Norvena Lineker during which trial the Judge first gave voice to ex-

pressions (157) substantially similar to those complained of here—both of the McColgans being in court at the time. It was further made to appear at the hearing that the Judge had absolutely no personal acquaintance with either Daniel A. McColgan or R. McColgan and was unable to distinguish them by their names and, as then stated by the Judge, any idea or sentiment of personal bias or prejudice against the McColgans had never entered his mind but that all that had been expressed by him and now made the subject of complaint was based solely and alone upon impressions made upon his mind by the testimony in the case of Lineker v. Dillon given by Daniel A. McColgan as to his participation in the transaction there involved and that the Judge was not now aware of any sentiment or feeling that would preclude him from giving a fair and impartial trial to the issues involved in this cause as to all the defendants.

"Assuming that the application has been made in good faith I think it sufficient to say that the facts do not in my judgment afford a sufficient basis to work a disqualification under Section 21 of the Code. In the first place by its very terms the section negatives the idea that a party may sit by after having the claimed disqualifying circumstances brought directly to their knowledge months before the term and let the cause go to trial without interposing the objections. The disqualifying affidavit must be filed ten days before the term 'unless good cause be shown for the failure'; and this cause must appear on the face of the affidavit. Here the substantive evidence of the claimed bias and prejudice had been presented to the complaining defendants as early as the trial of Lineker v. Dillon in 1919, and there is nothing to excuse the delay. If it be claimed that the disqualification (158) was disclosed for the first time upon the statement made by the Judge on the

submission of the question of *res judicata* the defendants are in no better position since it appears that they sat mute under that statement without objection or suggestion and permitted the cause to be taken under submission and held for over six weeks before decision and then moved only when the conclusion of the Judge was not what they had hoped. A party cannot be permitted to thus sit silent and gamble on a favorable result and, losing out, attempt for the first time to assert his right. I am satisfied the assertion of the right claimed here came too late to justify its recognition.

"But there is another and deeper reason for denying the application. A consideration of the section under which the claim is made shows at once that the mere assertion of a bias or prejudice on the part of a Judge is insufficient to work a disqualification. There must be a statement of the facts tending to show such state of mind; and obviously those facts must be such as would reasonably be calculated to disclose the existence of the disqualifying attitude specified in the Statute.

"The facts stated in these affidavits wholly fail to meet that requirement. 'Personal' bias or prejudice cannot properly be said to arise from views formed in the mind of a Judge, however freely expressed, founded upon sworn testimony in a cause before him upon which he is called upon to pass. If it were otherwise no Judge would be qualified to re-try a cause upon which he had been required to pass where for any reason the judgment first entered had to be set aside and the cause reheard. This is not the meaning of the statute.

"For these reasons the application is denied."

There is an inherent weakness in the contention that the expressions of the trial judge alluded to,

indicate bias and prejudice against appellants, in this, that the remarks objected to, constitute an expression of a *judicial* opinion as contradistinguished from a *personal* opinion. Judge Van Fleet merely indicated the impression made upon his mind as a judge by certain evidence given in the trial of the former *Dillon* case. Any opinion which he may have formed from testimony introduced under the issues of that case, was essentially a judical opinion; that is, it was an opinion and a conclusion reached in the exercise of his judicial functions. Such an opinion or state of mind can never constitute personal bias and prejudice within the meaning of the statute. If it could be regarded as constituting personal bias and prejudice, then a judge must always of necessity, by reason of the opinions formed and conclusions reached from the evidence in the trial of a given case, become disqualified under the statute, from presiding in any subsequent case to which the losing parties or discredited witnesses are parties.

It is respectfully submitted that the order of the trial court denying appellants' motion for designation of a judge other than Honorable William C. Van Fleet to try said case, should be affirmed.

Dated, San Francisco,
March 3, 1923.

Respectfully submitted,

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Attorneys for said Appellees.